

Supreme Court of the
FILED 1977

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-848

DELMAS McCLENDON, ET AL.,
Petitioners,

VERSUS

LEE SLATER, Secretary of the
State Election Board, et al.,
Respondents.

BRIEF OPPOSING CERTIORARI

LARRY DERRYBERRY
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

MICHAEL CAUTHRON
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105
Attorneys for Respondents

January, 1977

TABLE OF CONTENTS

Statement of Case	1
Question Presented: Did the denial of ballot position as Presidential Electors deny petitioners their constitutional rights?	2
Constitutional Provisions and Statutes Involved	2
Proposition I: The denial of ballot position as Presidential Elec- tors did not deprive petitioners of their constitu- tional rights and a writ of certiorari should be denied	4
Conclusion	9

TABLE OF AUTHORITIES

CASES CITED:

American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296 (1974)	7
Eugene McCarthy, et al. v. Slater, Okl., 553 P.2d 489 (1976)	6
Jenness, et al. v. Fortson, 403 U.S. 431, 91 S.Ct. 1970 (1971)	6
Williams v. Virginia State Board of Elections, 288 F.Supp. 622 (D.C. Va. 1968)	5

STATUTES CITED:

26 O.S. Supp. 1976, § 10-101	2, 5
26 O.S. Supp. 1976, § 10-109	5
26 O.S. Supp. 1976, § 1-107	3, 5
26 O.S. Supp. 1976, § 1-108	3, 5, 6
26 O.S. Supp. 1976, § 1-109	4, 6

AUTHORITIES CONTINUED

-ii-

PAGE

CONSTITUTIONAL PROVISIONS CITED:

Article II, § 1, Cl. 2, United States Constitution 2, 5

OTHER AUTHORITIES CITED:

Texas Election Code, Art. 13.45(2) (Supp. 1973) 7

In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-848

**DELMAS McCLENDON, ET AL.,
Petitioners,**

VERSUS

**LEE SLATER, Secretary of the
State Election Board, et al.,
Respondents.**

BRIEF OPPOSING CERTIORARI

STATEMENT OF CASE

The petitioners on July 6, 1976, filed with respondents certain declarations and oaths as Presidential Electors of the American Party seeking ballot access on the November, 1976, General Election ballot in the State of Oklahoma. The documents tendered by petitioners were refused because of the failure of petitioners to comply with Oklahoma statutes controlling ballot access for potential Presidential Electors. Thereafter, the petitioners sought a writ of mandamus in the Oklahoma Supreme Court to compel respondents to place their names on the General Election ballot as Presidential Electors for the American Party and its candidates, Thomas Jefferson Anderson for President of the United States and Rufus Shackelford for Vice President of the United States.

The Oklahoma Supreme Court heard oral arguments and on the 19th day of August, 1976, denied the writ. The Oklahoma Supreme Court held that the provisions of the Oklahoma Statutes under consideration were not unconstitutional and did not discriminate against petitioners. Thereafter, petitioners sought a rehearing which was denied on September 24, 1976.

The case at bar was docketed on December 21, 1976.

QUESTION PRESENTED

DID THE DENIAL OF BALLOT POSITION AS PRESIDENTIAL ELECTORS DENY PETITIONERS THEIR CONSTITUTIONAL RIGHTS?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article II, § 1, Cl. 2 of the United States Constitution, provides in pertinent part:

"Each state shall appoint in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress. . . ."

Title 26 O.S. Supp. 1976, § 10-101, provides:

"The nominees for Presidential Electors of any recognized political party shall be selected at a statewide convention of said party in a manner to be determined by said party. The nominees for Presidential Electors shall be certified by said party's chairman to the Secretary of the State Election Board no fewer than ninety

(90) days nor more than one hundred eighty (180) days from the date of the General Election at which candidates for Presidential Electors shall appear on the ballot. Failure of a political party to properly certify the names of its nominees for Presidential Electors within the time specified shall bar such party from placing any candidates for Presidential Electors on the ballot at said election."

Title 26 O.S. Supp. 1976, § 1-107, provides:

"'Recognized political parties' shall include parties whose candidates' names appeared on the General Election ballot in 1974, and those parties which shall be formed according to law."

Title 26 O.S. Supp. 1976, § 1-108, provides:

"A group of persons may form a recognized political party at any time except during the period between July 1 and November 15 of any even-numbered year if the following procedure is observed:

"1. Notice of intent to form a recognized political party must be filed in writing with the Secretary of the State Election Board at any time except during the period between March 1 and November 15 of any even-numbered year.

"2. Within ninety (90) days after said notice is filed, petitions seeking recognition of a political party, in a form to be prescribed by the Secretary of the State Election Board, shall be filed with said Secretary, bearing the signatures of registered voters equal to at least five percent (5%) of the total votes cast in the last General Election either for Governor or for electors for President and Vice President. Each page of said petitions must contain the names of registered voters from a single county.

"3. Within thirty (30) days after receipt of said petitions, the State Election Board shall determine the sufficiency of said petitions. If said Board determines there are a sufficient number of valid signatures of registered voters, the party becomes recognized under the laws of the State of Oklahoma with all rights and obligations accruing thereto."

Title 26 O.S. Supp. 1976, § 1-109, provides:

"Any recognized political party whose nominee for Governor or nominees for electors for President and Vice President fail to receive at least ten percent (10%) of the total votes cast for said offices in any General Election shall cease to be a recognized political party. Said party may regain recognition only by following the procedures prescribed for formation of new political parties. The State Election Board shall proclaim the fact of a party's failure to receive a sufficient number of votes and shall order that said party cease to be recognized."

PROPOSITION I

THE DENIAL OF BALLOT POSITION AS PRESIDENTIAL ELECTORS DID NOT DEPRIVE PETITIONERS OF THEIR CONSTITUTIONAL RIGHTS AND A WRIT OF CERTIORARI SHOULD BE DENIED.

The eight petitioners sought ballot position as Presidential Electors committed to the candidacies of Thomas Jefferson Anderson and Rufus Shackelford, the American Party nominees for the offices of President and Vice President of the United States, respectively. The Secretary of the State Election Board refused to accept the declarations of candidacy of the petitioners. Respondents contend that the Secretary properly refused the efforts of petitioners and

that the Oklahoma Supreme Court fully and correctly considered the issues presented, the applicable constitutional and statutory provisions, and the prior decisions of this Court.

A plain reading of the United States Constitution reveals that the States acting through their Legislatures are granted the authority to establish the procedure for the selection of Presidential Electors. Article 2, § 1, Cl. 2. Obviously, the manner of selection of Presidential Electors must be free of constitutional infirmity. *Williams v. Virginia State Board of Elections*, 283 F.Supp. 622 (D.C. Va. 1968).

The Oklahoma Legislature enacted statutes in 1974 (operative in January, 1975) relating to the selection of Presidential Electors by "recognized political parties." Title 26 O.S. Supp. 1976, §§ 10-101 to 10-109. The term "recognized political party" is defined elsewhere in the statutes to include political parties whose candidates' names appeared on the General Election ballot in 1974 and "those parties which shall be formed according to law." Title 26 O.S. Supp. 1976, § 1-107. A relatively painless and wholly reasonable procedure for formation of a party is found at 26 O.S. Supp. 1976, § 1-108. The section requires notice of intent to form a party and the circulation of petitions to procure signatures of 5% of the total votes cast in the last General Election. This procedure was available to petitioners in the instant case. They sought to avail themselves of it and were apparently unsuccessful. Petitioners then attempted to attain ballot access by simply filing declarations and pursuing their remedies in the courts after the declarations were refused.

The procedure established by the Oklahoma Legislature in Section 1-108, *supra*, is not discriminatory or burdensome. The petitioners cite the case of *Eugene McCarthy, et al. v. Slater*, 553 P.2d 489 (Okl. 1976), and attempt to show themselves on equal footing with *independents* who sought ballot access in that case. McCarthy and his fellow petitioners (eight candidates for ballot positions as independent Presidential Electors) were successful in the Oklahoma Supreme Court because of the deficiency of Section 1-108 in providing a means of achieving ballot position as non-partisans. Petitioners in the instant case were by their own declarations committed to the principles and candidates of a "party," i.e., the American Party. As a matter of fact, the American Party had candidates on the General Election ballot in Oklahoma as late as 1972, but the failure of the candidates of the party to gain 10% of the total votes cast resulted in the dissolution of the party by operation of law. Title 26 O.S. Supp. 1976, § 1-109.

The holding of the Oklahoma Supreme Court in considering the issues presented by these petitioners is wholly consistent with the decisions of this Court. A procedure to achieve ballot position by a political organization in Georgia was scrutinized by this Court in *Jenness, et al. v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970 (1971), wherein the following language appears:

"The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and pro-

viding different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v. Rhodes*, *supra*.

"There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election. The 5% figure is, to be sure, apparently somewhat higher than the percentage of support required to be shown in many States as a condition for ballot position, but this is balanced by the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes. Georgia in this case has insulated not a single potential voter from the appeal of new political voices within its borders."

Like Georgia, Oklahoma places no burdensome restrictions on ballot access beyond the 5% requirement.

In *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296 (1974), a Texas election statute governing ballot position by new political parties was fully considered. The Texas statute provided that where candidates of a party polled less than 2% of the total gubernatorial vote or did not nominate a candidate for Governor, the party was required to pursue a third avenue of acquiring ballot position, namely, precinct nominating conventions and, if the required support was not found in the precinct conventions, the circulation of petitions for signatures. See *Texas Election Code*, Art. 13.45(2) (Supp. 1973).

In upholding the Texas statutes in the face of claims that they were violative of the Equal Protection Clause of the Fourteenth Amendment and impermissibly burdensome on rights protected by the First and Fourteenth Amendments, the Court, in its opinion delivered by Mr. Justice White said:

"We have concluded that these claims are without merit. We agree with the District Court that whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discriminations against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further compelling state interests, *Storer v. Brown*, 415 U.S., at 729-733, 39 L. Ed.2d, at 723-725. But we also agree with the District Court that the foregoing limitations, whether considered alone or in combination, are constitutionally valid measures, reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways.

" . . .

"In sum, Texas 'in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life.' *Jenness v. Fortson*, 403 U.S. at 439, 29 L. Ed. 2d 554. It affords minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more."

It is respectfully submitted that the Oklahoma Supreme Court has correctly interpreted the questions presented by petitioners in accord with the applicable decisions of this Court.

CONCLUSION

In light of the foregoing argument and authorities, it is requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

MICHAEL CAUTHRON
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105
Attorneys for Respondents

January, 1977

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument to which this certification is attached was mailed to the following this _____ day of _____, 1977:

Robert Lee Blackwood
Attorney-at-Law
1311 South Guthrie
Tulsa, Oklahoma 74119

MICHAEL CAUTHRON